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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 274

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SUPREME COURT, U.S.

CO-ORDINATED TRANSPORT, INC. OF ILLINOIS, A CORPORATION, ET AL.,

Appellants,

vs.

EDWARD J. BARRETT, AS SECRETARY OF STATE OF THE STATE OF ILLINOIS, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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SUPREME COURT OF THE UNITED STATES

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No. 274

CO-ORDINATED TRANSPORT, INC. OF ILLINOIS, A CORPORATION, ET AL.,

Plaintiffs-Appellants,

vs.

EDWARD J. BARRETT, AS SECRETARY OF STATE OF THE STATE OF ILLINOIS, ET AL.

Defendants-Appellees

STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Now come Edward J. Barrett, as Secretary of State of the State of Illinois, Donald Barnes, Commanding Officer of the Second District of the State Highway Police of the State of Illinois, and Anthony C. Wegman, Sheriff of Kane County, Illinois, and file their statement in opposition to appellants' statement as to jurisdiction and hereby move the Court (1) to dismiss the appeal herein or (2) in the alternative, to affirm the judgment of the Supreme Court of Illinois, from which judgment said appeal is taken. In support of the foregoing appellees specify the following:

The Appeal Herein Is Without Merit There Being No Substantial Federal Question Involved

Appellees urge that the appeal herein is without merit for the reason that the facts in this case and the decision

of the Supreme Court of Illinois do not present any substantial federal question requiring review by this Court. The contentions of appellants as set forth in their assignment of errors and jurisdictional statement fall within the following categories:

I. The instant case is not governed by *Bode vs. Barrett*, 412 Ill. 204, 106 N. E. 2d 521 (Docket No. 187, October Term 1952).

II. The Act in question imposes an unlawful burden upon interstate commerce.

III. The Act in question is confiscatory in violation of the Fourteenth Amendment.

IV. The Act in question contains vague, arbitrary and inconsistent provisions in violation of the Fourteenth Amendment.

We shall discuss these contentions in the above order, and demonstrate that the same are without merit.

I

The Issues in This Case Are Governed by Bode et al. v. Barrett, et al.

At the outset it should be noted that the issues in this case with respect to alleged violations of the federal constitution are identical with and are governed by the decision of the Supreme Court of Illinois in *Bode et al* v. *Barrett et al*, 412 Ill. 204, 106 N. E. 2d 521. The *Bode* case is pending on appeal before this Court (Docket No. 187, October Term, 1952) subject to appellees' motion to dismiss the appeal or affirm the judgment of the Supreme Court of Illinois.

In the instant case the trial court by its decree declared the 1951 Act amending the Motor Vehicle Law of Illinois to be unconstitutional and void as violative of Section 8 of Article I and Section 1 of Amendment XIV of the

United States Constitution and as violative of certain provisions of the Illinois Constitution which are of no present concern. A reference to the opinion in the *Bode* case, 412 Ill. 204, 106 N. E. 2d 521, demonstrates that the plaintiffs there specifically assailed the 1951 Act under the identical provisions of the federal constitution and that the Supreme Court of Illinois after a most comprehensive consideration of the questions raised upheld the constitutionality of the Act in its entirety. Furthermore, the Supreme Court of Illinois, in its opinion in the instant case, specifically stated (—— Ill. ——; 106 N. E. 2d 510, 512):

> "Each of the issues as to unconstitutionality presented in the pleadings, briefs and arguments in the instant case was presented to and decided by this Court in its recent decision in the case of *Bode* v. *Barrett*, 412 Ill. 204, 106 N. E. 2d 521, with the exception of the issue raised under Section 13 of Article IV of the Illinois constitution."

The exception mentioned by the Illinois Supreme Court relates to a non-federal issue upon which appellants do not and may not here rely. We urge, therefore, that the appeal herein should be dismissed or, in the alternative, that the judgment of the Supreme Court of Illinois be affirmed for the reasons set forth in the appellees' motion to dismiss or affirm in *Bode*, Docket 187, October Term, 1952.

II

The Claimed Unlawful Burden on Interstate Commerce

A

There is no party before this Court entitled to challenge the Illinois statute upon the ground that it imposes an unlawful burden upon interstate commerce in violation of Section 8 of Article I of the United States Constitution.

The operations of four of the appellants are confined entirely to Illinois (Church, Abst. 86-88; Valentine, Abst. 94-96; Field, Abst. 80-81; Haen, Abst. 71-75). The individual appellants are all residents of Illinois. All but two of the corporate appellants are Illinois corporations and these two are foreign corporations licensed and qualified to do business in Illinois. All appellants, both individual and corporate, maintain places of business in Illinois in connection with which they conduct extensive intrastate operations making use of the Illinois highways. Some of the appellants, in addition to their Illinois intrastate operations, use their trucks in making interstate trips from Illinois into other states. All witnesses testified that by virtue of the Illinois license plates on their trucks they were granted reciprocity in other states into which they made trips and paid no vehicle license fees outside of Illinois.

Thus it will be seen that the appellants here seeking to claim an unconstitutional burden upon their interstate operations are all Illinois residents or concerns having places of business in Illinois from which both intra and interstate operations are conducted. As such they make extensive use of the Illinois highways and are taxed on a parity with all other Illinois truck owners and operators. Those who, in addition to their intrastate operations, choose to engage in interstate trips from Illinois to other states are treated no differently tax-wise from other Illinois truck operators. The license fees which they pay to Illinois give them the full privilege of unlimited use of the Illinois highways for the registration period and, in addition, afford them reciprocity in other states into which they make interstate trips. The license fees paid to Illinois by appellants are neither increased nor diminished by reason of the fact that some of appellants engage in interstate as well as intrastate operations. Those appellants

whose operations are wholly intrastate could commence interstate operations without the payment of additional taxes. Likewise, those appellants who are engaged in interstate operations could, if they chose, cease such operations but would nevertheless be required to pay the Illinois taxes because of the use of the Illinois highways in their intrastate operations.

Since all of the appellants are engaged in extensive intrastate operations in Illinois and are therefore required to pay the Illinois license fees irrespective of whether or not they engage in interstate operations, they are in no position to urge that the Illinois taxes amount to an unlawful burden upon their interstate operations.

In *Southern Railway Co.* v. *King*, 217 U. S. 524, this Court said (page 534):

> "It is the settled law of this court that one who would strike down a state statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution."

See also, *Missouri, Kansas and Texas Ry.* v. *Cade*, 233 U. S. 642, 648; *Massachusetts* v. *Mellon*, 262 U. S. 447, 488; *Hendrick* v. *Maryland*, 235 U. S. 610, 621; *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 595-596.

B

But aside from the fact appellants are in no position to urge a violation of the commerce clause, we believe it is obvious that, on the merits, their contentions have been denied by this Court in "decisions so precisely applicable alike in facts and in principle as to apply a closure to de-

bate." *Aero-Mayflower Transit Co.* v. *Georgia*, 295 U. S. 285, 289.

It will appear from an examination of the 1951 Act and from the discussion of the same in *Bode* v. *Barrett*, 412 Ill. 204, 106 N. E. 2d 521, that the Act imposes flat annual license fees upon trucks graduated in amounts in accordance with weight brackets or classifications. The tax is imposed for the unlimited privilege of using the Illinois highways during the registration period and the Act requires that the tax be deposited in a special road fund to be used only for retirement of highway bonds, cost of administration of the Act and for highway construction and maintenance purposes.

The tax rates imposed by the 1951 Act constitute an attempt by the State to equalize on a ton-mile basis the motor vehicle and gasoline taxes paid by truck operators with those paid by passenger car operators. The method or formula by which such equalization was accomplished is described at length by the Supreme Court of Illinois in its opinion in the *Bode* case, 412 Ill. 204, 106 N. E. 2d 521, and will not be repeated here.

At the trial of this case the appellants presented the testimony of a Professor Worley who espoused a different theory or formula for calculating motor vehicle license fees and who criticized the ton-mile theory of equalization. At the same time Worley admitted that his theory was highly controversial and that there was a great difference of opinion among highway engineers as to the merits of various theories of taxation. The State introduced evidence to the effect that its theory of equalization upon a ton-mile basis has the support of a respectable body of opinion among experts on the subject.

On the basis of the Worley testimony the appellants contended that the taxes imposed by the 1951 Act were without

rational basis, bore no relationship to the privilege of using the Illinois highways, were excessive and hence constituted an unreasonable burden upon interstate commerce.

The net of the evidence in the record is that two theories of calculating a schedule of motor vehicle license fees have been advanced. It is apparent that such a situation leaves room for legislative judgment and that which theory is to be adopted lies within the province of the legislature and not the courts.

In *Sproles* v. *Binford*, 286 U. S. 374, a Texas statute forbade operation of any motor vehicle carrying a net load of freight exceeding seven thousand pounds. This was attacked as violative of the Commerce Clause and the Fourteenth Amendment of the Constitution. It was contended that the net load limitation as contrasted with a possible gross load limitation, was "opposed to sound engineering opinion" and hence invalid. In overruling this contention this Court said (page 388):

> "... Limitations of size and weight are manifestly subjects within the broad range of legislative discretion. To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the 14th Amendment was intended to secure."

Again, this Court, in *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 546, in discussing factors involved in state motor vehicle tax formulas, said:

> "These factors, like those relevant in considering the constitutionality of other state taxes, are so countless that we must be content with 'rough approximation rather than precision'."

Also, in *Metropolis Theatre Co.* v. *Chicago*, 228 U. S. 61, this Court, in upholding a theatre license ordinance of the City of Chicago, said (pages 69-70):

> "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void under the Fourteenth Amendment; and such judgment cannot be pronounced of the ordinance in controversy."

This Court has uniformly upheld the validity of state motor vehicle laws imposing flat annual taxes upon vehicle operators. *Carley & Hamilton* v. *Snook*, 281 U. S. 66; *Hicklin* v. *Coney*, 290 U. S. 169; *Aero-Mayflower Transit Co.* v. *Georgia*, 295 U. S. 285; *Dixie Ohio Express Co.* v. *State*, 306 U. S. 72; *Clark* v. *Poor*, 274 U. S. 554; *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542. In order to be valid such tax laws need not be framed on the basis of a mileage tax. *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542; *Aero-Mayflower Transit Co.* v. *Georgia*, 295 U. S. 285. As to interstate carriers such laws are valid provided the amount of such taxes is not in excess of fair compensation for the privilege of using the State's roads and highways. *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 547. It is clear that the phrase "fair compensation for the privilege of using the highways of the State" means that privilege which is afforded by the tax and not the amount of mileage an individual operator may find it convenient to use. *Aero-Mayflower Transit Co.* v. *Georgia*, 295 U. S. 285, 289.

Obviously the taxes imposed by the 1951 Act based as they are upon the equalization of truck taxes with passen-

ger car taxes upon the ton-mile theory have a fair and reasonable basis and are directly related to the privilege of road use. Hence the same, under the uniform holdings of this Court, cannot be said to amount to an unlawful burden upon interstate commerce.

III

The Claim of Confiscation in Violation of the Fourteenth Amendment

In their assignments of error numbers 5 and 6 appellants contend that the taxes imposed by the 1951 Act are so excessive as to amount to "confiscation of a lawful industry" and "confiscation as to whole segments of the truck industry" in violation of Section 1 of Amendment XIV of the Federal Constitution.

In this case fourteen witnesses operating or employed by trucking concerns testified. Some of them testified as to the net profits which had been realized by their concerns in the past and made estimates as to future annual net profits. In a few cases it was testified that the taxes imposed by the 1951 Act would exceed estimated future net profits calculated upon the basis of the then current transportation rates. There is no evidence whatsoever in the record that the witnesses who so testified were representative of or a fair cross section of the many thousands of concerns engaged in the trucking business in Illinois. *Not one witness testified that the increased rates imposed by the 1951 Act would force his concern to go out of business.* Obviously such testimony wholly fails to establish a case of confiscation such as appellants claim.

But appellants' claim of violation of the Fourteenth Amendment by reason of alleged excessiveness of amount of the tax is wholly answered adversely to appellants' contentions by prior decisions of this Court.

In *Magnano Co.* v. *Hamilton*, 292 U. S. 40, this Court sustained a state tax upon butter substitutes against a contention that the same was violative of the Fourteenth Amendment because so large in amount as to confiscate the plaintiff's business. The Court said (page 44):

> "Except in rare and special instances, the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution. *Brushaber* v. *Union Pac. R. Co.*, 240 U. S. 1, 24. And no reason exists for applying a different rule against a state in the case of the Fourteenth Amendment. *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 329; *Heiner* v. *Donnan*, 285 U. S. 312, 326. That clause is applicable to a taxing statute such as the one here assailed only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property. Compare *McCulloch* v. *Maryland*, 4 Wheat. 316, 423; *Child Labor Tax Case*, 259 U. S. 20, 37 et seq.; *McCray* v. *United States*, 195 U. S. 27, 60; *Brushaber* v. *Union Pac. R. Co.*, supra, 24-25; *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 614-615; *Nichols* v. *Coolidge*, 274 U. S. 531, 542. Collateral purposes or motives of a legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry. *McCray* v. *United States*, supra, 56-59. Nor may a tax within the lawful power of a state be judicially stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses (*Loan Association* v. *Topeka*, 20 Wall. 655, 663-664; *McCray* v. *United States*, supra, 56-58, and authorities cited; *Alaska Fish Co.* v. *Smith*, 255 U. S. 44, 48-49; *Child Labor Tax Case*, supra, 38, 40-43), unless, indeed, as already indicated, its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere dis-

guise, under which there was exercise, in reality, another and different power denied by the Federal Constitution to the state."

There is no claim here, nor indeed could it be contended, that the taxes imposed by the 1951 Act fall within the class of "rare and special instances" involving not the exertion of the State's taxing power but the "exertion of a different and forbidden power" mentioned in the above quotation from the *Magnano* case.

Again, the principle of the *Magnano* case was reiterated by this Court in *United States* v. *Sanchez*, 340 U. S. 42, 44, where this Court said:

> "It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages or even definitely deters the activities taxed."

IV

The Claimed Violation of the Fourteenth Amendment by Reason of Alleged Vague, Arbitrary and Inconsistent Provisions.

In their assignments of error numbers 9 and 11 appellants claim that the Supreme Court of Illinois erred in refusing to hold the 1951 Act to be violative of the Fourteenth Amendment by reason of certain alleged vague, inconsistent and arbitrary provisions contained in the Act.

In assignment of error numbered 11 specific reference is made to "an indefinite agricultural exclusion" and in appellants' jurisdictional statement reference is made to the agricultural exemption as an "unreasonable classification." The provisions of Section 9 of the 1951 Act relating to exemption from taxation of certain farm and agricultural vehicles and implements have been contained in the Motor Vehicle Law of Illinois in substantially their present form for over twenty years. Such provision was first enacted in 1931, Laws 57th G. A., 1931, p. 789. It has been reenacted

many times since then and occasionally has been amended in minor particulars. There is no evidence whatsoever in the record with reference to the alleged indefiniteness of the exemption provision and, indeed, there could be none for the fact is the exemption provision is clear and definite and has been administered without difficulty for over twenty years. Likewise, the claim that the agricultural exemption is an "unreasonable classification" is foreclosed by prior decisions of this Court and numerous state court decisions upholding the validity of similar exemption provisions in state motor vehicle laws. See, *Aero-Mayflower Transit Co.* v. *Georgia Publ. Serv. Comm.* 295 U. S. 285; *Hicklin* v. *Coney*, 290 U. S. 169; *Continental Baking Co.* v. *Woodring*, 286 U. S. 352; *Ex Parte Iratacable*, 55 Nev. 263, 30 Pac. (2d) 284; *Nance* v. *Harrison*, 176 Ga. 674, 169 S. E. 22; *Anderson* v. *Thomas*, 144 Ore. 572, 26 Pac. (2d) 60; *Collins* v. *State*, 154 Okla. 121, 7 Pac. (2d) 123; *East Tenn. Motor Co.* v. *Carden*, 164 Tenn. 416, 50 S.W. (2d) 230; *Hudson* v. *Stuart*, 166 Miss. 339, 145 So. 611; *State* v. *Public Service Commission*, 207 Wis. 664, 242 N. W. 668. In the court below appellants cited and relied upon *Smith* v. *Cahoon*, 283 U. S. 553, in support of their contention that the agricultural exemption provisions of the Act were violative of the Fourteenth Amendment. But the inapplicability of the *Smith* case to such an agricultural exemption in a motor vehicle law was specifically pointed out by this Court in *Aero-Mayflower Transit Co.* v. *Georgia*, 295 U. S. 285, 291-293.

Appellants' claims of unconstitutionality based upon the lower tax rates provided for buses operating in a municipality or municipalities or within a "close radius thereof"; upon alleged indefiniteness of the phrase "maximum load" and upon other claims of indefiniteness and unreasonable classifications and exemptions were all fully discussed and determined adversely to appellants' contention by the Supreme Court of Illinois in its opinion in *Bode* v. *Barrett*,

412 Ill. 204, 106 N. E. 2d (1921). We believe a mere reading of that opinion establishes beyond doubt the lack of merit in appellants' contentions and, more particularly, that none of said contentions involve a substantial federal question requiring consideration by this Court.

Wherefore, we urge that this Court grant the aforesaid motion to dismiss the appeal or, in the alternative, to affirm the judgment of the Supreme Court of Illinois for the reason that no substantial federal question is presented requiring review by this Court.

Respectfully submitted,

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